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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **RICO LAVERT FERNANDO,** **Defendant and Appellant.**	**A130704** **(Solano County Super. Ct. No. VCR206645)**

Appellant Rico Lavert Fernando was tried before a jury and convicted of first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a).) He was sentenced to prison for an aggregate term of seven years eight months, consisting of the six-year upper term on the burglary count and consecutive terms of one year and eight months, respectively, for convictions of transporting marijuana and possession of a controlled substance, which arose in previous cases. (Health & Saf. Code, §§ 11360, subd. (a), 11350, subd. (a); Solano County Superior Court Nos. VCR184428 & VCR183543.) Appellant contends that (1) the judgment must be reversed because the court did not allow him to present expert testimony regarding eyewitness identification; and (2) fines of $200 each on the subordinate counts should be deemed satisfied based on presentence credits in excess of the term appellant was ordered to serve. We agree with the second contention, which the People concede, but otherwise affirm the judgment.

FACTS

Gerald Meyer and Susan Doan lived at 39 Carroll Street in Vallejo. On March 2, 2010, they left their home at about 11:00 a.m. That afternoon, their neighbor, Mary Bern,

noticed two or three men walk past her home and down the driveway toward the rear of the house at 39 Carroll. Another neighbor, William Tschida, was leaving his house shortly before 3:00 p.m. and noticed two or three young men standing on the sidewalk. As he drove away, Tschida looked in his rearview mirror and saw them dart across the street into either his backyard or his neighbor's backyard. Tschida circled around and came back to check his backyard, but he did not see anything. He left on his errand and returned by 3:20 p.m.

Sometime between 3:30 and 4:30 p.m., Tschida and Bern each (independently) noticed a maroon Buick drive down their street and come to a stop at the curb. Either three or four men got out of the car and walked down the driveway of 39 Carroll. Tschida took down the license plate number of the Buick and his wife called the police. Bern saw the men go up the back steps to the house at 39 Carroll, and she ran to the second floor of her house where she could see the back porch of 39 Carroll. She did not see the men on the porch so, surmising they had gone inside, she called the police. Bern had not seen the faces of the men in the driveway and gave the dispatcher only the "clothing and age" of the suspects.

Steven Edwards, another neighbor, saw three men entering the driveway at 39 Carroll Street, one of whom was wearing a black wool jacket and blue jeans with gold engravings on the back pockets. He noticed Mary Bern making the call to the police from the front of her house. He and Bern both went inside her house, where, looking outside, Edwards saw four men running out the back door at 39 Carroll. He ran outside to chase them, but stopped when he noticed that police officers had arrived. Bern saw four young Black men leave the back of the house at 39 Carroll and run toward the home's backyard fence.

Vallejo Police Department Officers Wilcox, Florendo and McCarthy responded to the burglary call. While Officer Florendo maintained a presence at the front of 39 Carroll Street, Officers Wilcox and McCarthy proceeded to the rear. They heard people jumping the fence and saw that a screen had been cut on a back window of the house. Marco Wright came out the back door and was arrested; he was carrying jewelry later identified

as belonging to Gerald Meyer, one of the residents of the house, and coins that may have belonged to Susan Doan, the other resident. The inside of 39 Carroll Street was in disarray and a number of items, including TVs, handbags, a camera and a computer monitor, were stacked up in the kitchen near the back door. The house had not been in that condition when Meyer and Doan left that morning.

Meanwhile, Rhonda Rule saw three men run into her backyard on nearby Glenn Street. She flagged down Vallejo Police Officer Munoz, who asked her, "Where did they go?" Munoz went into Rule's backyard, where he found a .45 caliber automatic handgun that was later identified as belonging to Gerald Meyer of 39 Carroll Street.

Vallejo Police Officer Poyser was on patrol monitoring radio calls about the burglary at 39 Carroll Street when he received information that the suspects were running toward Glenn Street. He turned onto Amador Street, which was close to Glenn, and detained Jerryn McElveen when he saw him walk out from between two houses. Vallejo Police Corporal Harmer arrived at the scene of the McElveen detention and went into the backyard of 1212 Amador, where he noticed a shed with its door open. Appellant was inside, sweating and nervous. He told Harmer he was hiding because he was being chased by a dog. After appellant had been handcuffed and placed in a police vehicle, Harmer noticed Terrell Richardson on the roof of a shed in an adjacent yard. When Richardson was later transported to the police station, he was found to be carrying watches belonging to Susan Doan of 39 Carroll Street.

Police transported William Tschida to Amador Street for a show-up of appellant, McElveen and Richardson, but he could not identify anyone because he had not seen the faces of the individuals who went into 39 Carroll Street. At trial, Tschida testified that the three men at the show-up "had dark clothing on as well, and that appeared to be the same as the kind that I had seen running down the driveway." Police also transported Mary Bern and Steven Edwards to Amador Street for a show-up. Bern did not identify appellant but thought his clothing was similar to that worn by one of the men she had seen running from 39 Carroll. Edwards recognized the clothing Terrell Richardson was

wearing, but did not recognize the face of any of the men who had been detained.[1] Finally, Rhonda Rule participated in a show-up and said that she recognized all three men by their clothing, and appellant by his hairstyle, as the three men who had been running into her backyard. She did not recognize any of their faces.

After appellant was taken to the police station, he offered a new explanation for his presence in the shed on Amador Street and said that he had been running away from three Black men with handguns. He told police he did not know McElveen and Richardson, but they were not the men who had chased him. A key found in appellant's pocket fit the Buick that was parked on Carroll Street. Appellant denied having a car and said he hadn't been driving that day.

After his arrest, appellant made a call to his brother from county jail in which he complained about two individuals, "Bones" and "Gumby," who were "telling" and "snitching." He noted that the police didn't find anything on him, but the police report said that "Gumby" and "Terrell" had stolen property in their pockets. He talked about "little niggas" who "ain't cool" and "better not be in the hood talking." Appellant asked about "nigga MacBlood" and told his brother to talk to him. Appellant spoke favorably of "Terrell": "Terrell good though . . Terrell ain't say shit." Appellant's brother commented, "Terrell ain't snitching," and appellant confirmed, "No. He good. . . . But Gumby[]? I'm telling you [], green light on that nigga. Bro, that nigga ain't solid, bro. . . . And that other little nigga I'm telling you about. That nigga ain't solid either[]. But Terrell – he good . . . . All them other two [] ain't good. . . ."

In addition to the property that was stacked in the kitchen or recovered from the suspects, three guns and ammunition were missing from 39 Carroll Street.

DISCUSSION

I. *Exclusion of Defense Expert on Eyewitness Testimony*

Appellant argues that the judgment must be reversed because the trial court excluded the testimony of a defense expert on eyewitness identification. He claims that

[1] Edwards' testimony, though somewhat unclear on this point, suggests that he may have seen one of the men's faces. He did not, in any event, identify appellant.

this ruling violated not only state rules of evidence, but also his federal constitutional rights to due process and to confront the witnesses against him.[2] We disagree.

A. Procedural Background

Dr. Robert Shomer, a forensic psychologist and expert in eyewitness identification, was appointed by the court to assist defense counsel in preparing for trial. (Evid. Code, §§ 730, 952.) Before trial commenced, the prosecution filed an in limine motion to prevent Dr. Shomer from testifying, on the ground that no eyewitness in the case had actually identified appellant. Defense counsel responded that while no witness had identified appellant based on his face, identifications had been made based on his clothing. Counsel explained that he would be calling Dr. Shomer to testify about issues concerning eyewitness identification that were beyond the common knowledge of jurors: the stress under which the witnesses made their observations, the effect of the lapse between the time the witnesses saw the suspicious men and the in-field show-ups, and the impact of cross-racial identification.[3]

The trial court granted the prosecution's motion and excluded the expert testimony under Evidence Code section 352. "[I]n the Court's opinion, this is not an eyewitness case, and I would find that [] to allow Dr. Shomer to testify would needlessly consume time and confuse jurors around the issues of what this case is really about. . . ." A mistrial was declared, and on retrial, the court issued an order incorporating all of its rulings on the in limine motions brought during the first trial. Dr. Shomer did not testify during the second trial, and appellant was convicted.

B. Analysis

"When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent

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[2] Although appellant did not specifically cite the federal Constitution when arguing that his expert should be allowed to testify, the trial court granted his motion to "constitutionalize" all objections. We deem this sufficient to preserve his federal claim on appeal.

[3] Defense counsel described appellant as African-American and the eyewitnesses as "white."

reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Such psychological factors include stress and the cross-racial nature of an identification. (*Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 573.) However, expert testimony on eyewitness identification is not invariably admissible and is "often unnecessary." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995 (*Lewis*).) We review a trial court's exclusion of such testimony under the deferential abuse-of-discretion standard. (*Ibid.*; see *People v. Curl* (2009) 46 Cal.4th 339, 359-360.)

The court did not abuse its discretion in excluding Dr. Shomer's testimony because none of the neighbors who were called as prosecution witnesses actually identified appellant as one of the men involved in the burglary. William Tschida could not identify anyone during an in-field show-up because he had not seen the faces of the burglary suspects; all he could say was that the individuals at the show-up were wearing dark clothing resembling the clothes worn by the individuals he saw running down the driveway of 39 Carroll Street. Mary Bern did not recognize appellant during an in-field show-up but thought his clothing was similar to that worn by the men she saw running from the burglarized home. Steven Edwards did not recognize appellant or any of the other suspects during a show-up, although he recognized the clothing that Terrell Richardson was wearing. Rhonda Rule, who saw three men run into her backyard, identified appellant, Jerryn McElveen and Terrell Richardson as those men based on their clothing and appellant's hairstyle, though she was clear that she could not identify any of the men by their faces. Given the state of the evidence, expert testimony about matters such as cross-racial identification and the effect of stress on a witness's ability to identify a suspect would have been of extremely marginal value.

Even if we assume that Dr. Shomer could have discussed factors relevant to a witness's ability to identify clothing and hairstyle, appellant cannot show he was

prejudiced by the exclusion of such testimony because it is not reasonably probable it would have led to a more favorable result. (*People v. Sanders* (1995) 11 Cal.4th 475, 510 (*Sanders*); *People v. Walker* (1986) 185 Cal.App.3d 155, 166 (*Walker*).) Suspects were seen running from Carroll Street, where the burglary was committed, onto Glenn Street and Amador Street. Police discovered appellant sweating and nervous in the backyard shed of a house on Amador, where he claimed that he was hiding because he was being chased by a dog. Another individual, Terrell Richardson, was found on top of the roof of a shed in an adjacent yard; Richardson was carrying watches that belonged to one of the burglary victims. At the police station, appellant changed his story and said he had been running away from three Black men with handguns, though he denied that the other men who had been arrested were among the men who had been chasing him. Appellant also told police he did not know McElveen and Richardson, though in a recorded telephone call he made from jail to his brother, he seemed to refer to them both and urged his brother to do something about two men (most likely McElveen and Wright) whom he believed were talking to the police. Although appellant had told the police he was not driving a car on the day of the burglary, he was holding a key fitting the Buick that was used in the burglary.

Against this backdrop, it is not reasonably probable the verdict would have been affected by Dr. Shomer's testimony. (*Walker*, *supra*, 185 Cal.App.3d at p. 166; see *Lewis*, *supra*, 39 Cal.4th at pp. 995-996 [no prejudicial error in excluding expert on eyewitness testimony when prosecution relied on circumstantial evidence of defendant's involvement and witnesses had been unable to identify the defendant].) We note that the court instructed the jurors with CALCRIM 315, which advised them to consider a number of factors relevant to the accuracy of eyewitness identification.[4] (See *Sanders*,

[4] CALCRIM No. 315 provided: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as

supra, 11 Cal.4th at p. 510 [relying in part on similar jury instruction to find exclusion of expert harmless].) Reversal of the judgment is not required.

We also reject appellant's claim that exclusion of the expert testimony violated his federal constitutional rights. " 'A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right [citations].' " (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 724.)

II. *Application of Presentence Credits to Fines*

In addition to the six-year sentence on the burglary charge, the trial court imposed consecutive sentences for appellant's convictions in two previous cases: a one-year term (one-third the middle term) for the sale of marijuana under Health & Safety Code section 11360, subdivision (a) (VCR184428) and an eight-month term (one-third the middle term) for possessing a controlled substance under Health and Safety Code section 11350, subdivision (a) (VCR183543). The court also imposed a $200 restitution fine for each of these counts. (Pen. Code, § 1202.4, subd. (b).) Appellant argues that because he had 706 actual days of presentence custody credits in each case, which far exceeded the length of the terms imposed, the excess number of credits should have been applied to reduce the restitution fines. The People agree.

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lighting, weather conditions, obstructions, distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant [is] not guilty."

Penal Code section 2900.5, subdivision (a) requires that the court to credit a defendant with time spent in custody: "In all felony and misdemeanor convictions . . . when the defendant has been in custody . . . all days of custody of the defendant . . . including days . . . credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment, *or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars ($30) per day* . . . In any case where the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter *the remaining days, if any, shall be applied to the fine on a proportional basis*, including, but not limited to, base fines and restitution fines." (See, generally, *People v. Robinson* (2012) 209 Cal.App.4th 401, 406-407; *People v. McGarry* (2002) 96 Cal.App.4th 644, 646-647.)

At the statutory rate of $30 a day, it would take only seven days of credit to extinguish a fine of $200. Appellant served hundreds of days in presentence custody in excess of the length of the terms of the two subordinate counts. Thus, appellant's two $200 fines have been fully satisfied and the judgment should be modified to so reflect.

DISPOSITION

The judgment is modified to deem the $200 restitution fine in Case No. VCR184428 and the $200 restitution fine in Case No. VCR183543 to have been paid in full. The clerk of the superior court is directed to modify the abstract of judgment to reflect this modification and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.